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Wednesday, February 01, 2006

Executive power and the interpretation of laws

While I'm on the subject of applying software metaphors to legal code, here is a short article I recently wrote on the principle of least authority.

I go into issues of executive versus legislative power in the U.S. in more depth in Origins of the Non-Delegation Doctrine, with extensive commentary on this subject from both Federalists and Anti-Federalists. (As you may recall, the Federalists were the primary movers behind the original Constitution, and the anti-Federalists were the primary movers behind the Bill of Rights. The Constitution was ratified by most states conditional to a Bill of Rights, which was later pushed through Congress by anti-Federalists and compromising Federalists such as James Madison).

The paper also discusses further how protection of liberties was the prime motivation for the mechanisms such as checks and balances in the Constitution. As Locke said:

"[w]e agree to surrender some of our natural rights so that government can function to preserve the remainder. Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of nature for, nor tie themselves up under, were it not to preserve their lives, liberties, and fortunes; and by stated rules of right and property to secure their peace and quiet."[1]

[1] John Locke, The Second Treatise On Government XI:137 (1691).

Posted by Nick Szabo at 12:49 PM

1 comment:

Anonymous said...

Thomas Paine said in a letter to Thomas Jefferson in 1789:

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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"Like most blogs worth my attention, this blog is updated only infrequently. That is because the authors of blogs worth my attention only post when they have something to say that is true, relevant and not already known by their audience. Most of the human race does not have the skill to know when an idea has these three properties. The skill is particularly rare in the fields of politics and economics, which is why this blog is such a rare and valuable thing." -- Richard Hollerith

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After I got home, being alone and wanting amusement I sat Down to explain to myself (for there is such a thing) my ideas of natural and civil rights and the distinction between them -- I send them to you to see how nearly we agree.

Suppose 20 persons, strangers to each other, to meet in a Country not before inhabited. Each would be a Sovereign in his own Natural right. His will would be his Law, but his power, in many cases, inadequate to his right and the consequences would be that each might be exposed, not only to each other, but to the other nineteen.

It would then occur to them that their condition would be much improved, if a way could be Devised to exchange that quantity of Danger into so much protection, so that each individual Should possess the strength of the whole Number.

As all their rights, in the first case, are natural rights, and the exercise of these rights supported only by their own natural individual power, they would begin by distinguishing between those rights they could individually exercise fully and perfectly and those they could not.

Of the first kind are the rights of thinking, speaking, forming and giving opinions, and perhaps all those which can be fully exercised by the individual without the aid of exterior assistance or in other words, rights of personal competency. Of the second kind are those of personal protection, of acquiring and possessing property, in the exercise of which the individual natural power is less than the natural right.

Having drawn this line they agree to retain individually the first Class of Rights or those of personal Competency; and to detach from their personal possession the second Class, or those of defective power and to accept in lieu thereof a right to the whole power produced by a condensation of all the parts. These I conceive to be civil rights or rights of Compact, and see distinguishable from Natural rights, because in the one we act wholly in our own person, in the other we agree not to do so, but are under the guarantee of society.

It therefore follows that the more of those imperfect natural rights, or rights of imperfect power we give up and thus exchange the more security we possess, and as the word liberty is often mistakenly put for security Mr. Wilson has confused his Argument by confounding the terms.

But it does not follow that the more natural rights of every kind we resign the more security we possess, -- because if we resign those of the first class we may suffer much by the exchange, for where the right and the power are equal with each other in the individual naturally they ought to rest there.

Mr. Wilson must have some allusion to this distinction or his position would be subject to the inference you Draw from him.

I consider the individual sovereignty of the States retained under the Act of Confederation to be of the second Class of rights. It becomes dangerous because it is defective in the power necessary to support it. It answers the pride and purpose of a few Men in each State -- but the State collectively is injured by it.

. . . and of course in the Rights of Man:

Every history of the creation, and every traditional account, however they may vary in their opinion or belief of certain particulars, all agree in establishing one point, the unity of man; by which I mean that men are all of one degree, and consequently that all men are born equal, and with equal natural right, in the same manner as if posterity had been continued by creation instead of generation, the latter being the only mode by which the former is carried forward; and consequently every child born into the world must be considered as deriving its existence from God. The world is as new to him as it was to the first man that existed, and his natural right in it is of the same kind.

The duty of man is not a wilderness of turnpike gates through which he is to pass by tickets from one to the other. It is plain and simple, and consists but of two points: his duty to God, which every man must feel; and with respect to his neighbor, to do as he would be done by. If those to whom power is delegated do well, they will be respected; if not, they will be despised; and with regard

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to those to whom no power is delegated, but who assume it, the rational world can know nothing of them.

Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.

From these premises two or three certain conclusions follow:

First, that every civil right grows out of a natural right; or, in other words, is a natural right exchanged.

Secondly, that civil power properly considered as such is made up of the aggregate of that class of the natural rights of man which becomes defective in the individual in point of power, and answers not his purpose, but when collected to a focus, becomes competent to the purpose of every one.

Thirdly, that the power produced from the aggregate of natural rights, imperfect in power in the individual, cannot be applied to invade the natural rights which are retained in the individual, and in which the power to execute is as perfect as the right itself.

We have now, in a few words, traced man from a natural individual to a member of society, and shown the quality of the natural rights retained, and of those which are exchanged for civil rights. Let us now apply these principles to governments.

It has been thought a considerable advance towards establishing the principle of freedom to say that government is a compact between those who govern and those who are governed; but this cannot be true, because it is putting the effect before the cause; for as man must have existed before governments existed, there necessarily was a time when governments did not exist.

Governments arising out of society do so by establishing a constitution. A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in visible form, there is none. A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting its government. It is the body of elements to which you can refer and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and, in fine, everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound.

A constitution, therefore, is to a government what the laws made afterward by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made; and the government is in like manner governed by the constitution.

11:07 AM

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